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**IN THE
COURT OF APPEALS OF INDIANA**

DONALD HERMAN,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0607-CR-609
)	
STATE OF INDIANA,)	
)	
Appellee.)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 9
The Honorable Mark Stoner, Judge
Cause No. 49F09-0307-FD-117083

May 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Donald Herman, challenges the trial court's revocation of his probation. Upon appeal, Herman argues that the evidence is insufficient to support the trial court's determination.

We affirm.

On July 17, 2003, Herman was charged with criminal recklessness as a Class D felony, pointing a firearm as a Class D felony, and pointing a firearm as a Class A misdemeanor. Herman pleaded guilty to criminal recklessness,¹ and the trial court on October 10, 2003, sentenced him to three years with two years suspended to probation. As conditions of his probation, Herman was to enroll in substance abuse treatment within the first sixty days of the start of his probation and to refrain from the use of alcohol and controlled substances. As he began serving his probation, Herman was referred to Alpha Resources to enroll in a substance abuse relapse prevention program approved by the probation department.

On February 27, 2006, the State filed a notice of probation violation in which it alleged that Herman had failed to enroll in an approved substance abuse treatment program as directed. On March 30, 2006, the State filed a second notice of probation violation alleging again that Herman had failed to enroll in an approved substance abuse treatment program and adding a second allegation—that he submitted a urine sample on March 22, 2006 which tested positive for cocaine. On April 18, 2006, the State filed an amended notice of probation violation setting forth two additional allegations: (1) that

¹ The State agreed to dismiss the remaining charges.

Herman submitted a diluted urine sample on April 5, 2006, and (2) that Herman submitted a urine sample on April 11, 2006 which tested positive for cocaine.

The trial court held a hearing on April 21, 2006, at which Herman informed the court that he could not afford the fees charged by Alpha Resources, so he attended and claimed to have completed substance abuse counseling at Narcotics Anonymous. The court informed Herman that the treatment program he had attended was not an “acceptable” program and that he needed to receive treatment through Alpha Resources. Transcript at 9. At the conclusion of this hearing, the court placed Herman on strict compliance for sixty days and warned that if after such time Herman still was not abiding by the terms of his probation that he would likely “go to jail.” Transcript at 10.

On June 22, 2006, the State filed a second amended notice of probation violation adding allegations that Herman tested positive for cocaine on nine additional, separate occasions, all occurring after the April 21 hearing. At the conclusion of a revocation hearing on June 27, 2006, the trial court revoked Herman’s probation finding that he violated the terms of his probation by failing to attend appropriate substance abuse treatment and by submitting ten separate urine samples which tested positive for cocaine. With regard to his failure to attend appropriate substance abuse counseling, the trial court stated as follows:

“The Court, looking back at the original sentence, the Court was . . . had an open sentence. The Court was clear at that time that it was very concerned about substance abuse treatment. I gave him originally a three (3) year sentence with two (2) of those years suspended. [Herman] was ordered to get himself into a substance abuse treatment within sixty (60) days of probation. While [Herman] has been seeking some type of treatment, it has been treatment that was not authorized by probation as a recognized service

provider. [Herman] continued to go to that provider despite being warned by the Probation Department not to do that.” Transcript at 49.

With regard to the positive cocaine results, the court rejected Herman’s argument that the results were tainted by his use of a foot cream containing benzocaine. The trial court ordered Herman to serve 545 days of his previously suspended sentence.

Upon appeal, Herman argues that the evidence is insufficient to support the trial court’s revocation of his probation. We begin by noting our well-settled standard of review. A probation revocation hearing is civil in nature, and thus the State must prove the alleged violation by only a preponderance of the evidence. J.J.C. v. State, 792 N.E.2d 85, 88 (Ind. Ct. App. 2003). As with other sufficiency issues, we do not reweigh the evidence or judge the credibility of the witnesses and look only to the evidence which supports the judgment and any inferences flowing therefrom. Id. If there is substantial evidence of probative value to support the trial court’s decision that the probationer committed any violation, revocation is appropriate. Id. Violation of a single condition of probation is sufficient to revoke probation. Id.

Herman’s challenge to the sufficiency of the evidence is predicated in part on a challenge to the admission of certain evidence. Specifically, Herman argues that the trial court abused its discretion by admitting State’s Exhibits 1 through 11, which showed positive test results for cocaine usage by Herman, asserting that the State failed to establish a proper chain of custody.² Herman also claims that his positive test results

² A proper showing of chain of custody is that of a reasonable assurance that the property passed through the hands of the parties in an undisturbed condition. Bussberg v. State, 827 N.E.2d 37, 42 (Ind. Ct. App. 2005), trans. denied. Here, although the individual who collected Herman’s samples and the lab

were caused by his use of a foot cream which contained benzocaine.³ We need not address these issues, however, because revocation of Herman's probation is supported by the evidence establishing that Herman failed to attend an approved substance abuse treatment program. Herman's only challenge to the court's finding in this regard is that Herman "made an effort to mitigate the opportunity for potential noncompliance" by apparently attending a program which he knew was not approved. Appellant's Brief at 9.

Herman does not dispute that he did not attend substance abuse treatment through an approved facility. Moreover, we note that in extending leniency to Herman by offering him an additional sixty days to comply with the terms of his probation, the trial court warned Herman that failure to receive treatment through an approved program could result in his probation being revoked. Herman nevertheless failed to attend substance abuse treatment through an approved program. Given that a single violation of probation is sufficient to revoke probation, and noting that the record contains sufficient evidence to support the court's conclusion that Herman violated his probation by failing to seek substance abuse treatment through an approved program, we conclude that revocation of Herman's probation was appropriate.

technician who performed the tests did not testify, there is nothing in the record which suggests that Herman's samples did not follow the proper chain of custody. Norma Erickson, the manager of the drug-testing laboratory for the probation department, testified as to the procedure used to document the chain of custody. Ms. Erickson reviewed each of the State's Exhibits and testified that the chain-of-custody documentation was complete and that there was nothing out of order.

³ Ms. Erickson testified that, given the methodology used which tests for the cocaine metabolite, Herman's use of a foot cream containing benzocaine, which is not cocaine, would not have produced a false positive result on Herman's urine screens.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.